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No. (1)

Supreme Court, U.S.
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In The Supreme Court of the United States

CHRISTOPHER MATTHEW BROWN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

WHETHER THE TRIAL COURT'S REFUSAL TO GIVE PETITIONER'S REQUESTED JURY INSTRUCTION ON DURESS AS A DEFENSE TO UNINTENTIONAL MURDER AND SEVERAL UNDERLYING OFFENSES, WHERE SUBSTANTIAL EVIDENCE SHOWED THAT HE FEARED FOR HIS SAFETY WHEN HE EXCEEDED THE SPEED LIMIT AND DROVE RECKLESSLY, VIOLATED HIS DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT?

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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term 2007

CHRISTOPHER MATTHEW BROWN,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

Petition for a Writ of Certiorari to the North Carolina Court of Appeals

---

Petitioner, Christopher Matthew Brown, was convicted of second degree murder, assault with a deadly weapon inflicting serious injury, and three traffic offenses arising out of an automobile accident. Despite the presentation of evidence that he acted under duress, the trial court refused to instruct on this defense. The North Carolina Court of Appeals rejected petitioner's constitutional challenge to the fairness of his trial based on the absence of an instruction on duress. [7A-9A] *See Taylor v.*

Kentucky, 436 U.S. 478, 490 (1978)(due process violated by refusal to give defendant's requested jury instruction). Petitioner respectfully asks this Court to issue a writ of certiorari to review the decision and resolve a division among the jurisdictions on the constitutional entitlement to an instruction on an affirmative defense that is supported by the evidence. *See State v. Riedl*, 15 Kan. App.2d 326, 329, 807 P.2d 697, 700 (1991)("The case law from other jurisdictions *overwhelmingly* supports the conclusion that the compulsion defense, or similar defenses, should be deemed applicable to traffic offenses which do not require proof of criminal intent.")(emphasis added)(citing cases from fourteen states); *see also Lannert v. Jones*, 321 F.3d 747 (8th Cir.), *cert. denied*, 540 U.S. 917 (2003); *United States ex rel. Peery v. Sielaff*, 615 F.2d 402 (7th Cir.), *cert. denied*, 446 U.S. 940 (1979). (cases requiring duress) *with* (cases not requiring duress)

OPINION BELOW

The opinion of the North Carolina Court of Appeals is published. *State v. Brown*, 646 S.E.2d 775 (N.C. App.), *disc. rev. denied*, 2007 WL 2156124 (N.C. 27 June 2007). [3A-12A]

JURISDICTION

The opinion of the North Carolina Court of Appeals was entered on 4 May 2007. [3A] Petitioner timely sought review in the Supreme Court of North Carolina, which was denied on 27 June 2007. [1A] Petitioner presented the federal constitutional claim that the trial court erred in denying his request for

an instruction on the defense of duress to both courts, where it was rejected on the merits. [6A-9A] This important question justifies review by this Court, whose jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AMENDMENT INVOLVED

U.S. Const. Amend. XIV:

> "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to an person within its jurisdiction the equal protection of the laws."

STATE STATUTES INVOLVED

N.C. Gen. Stat. § 14-17: Murder in the first and second degree defined; punishment

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed during the perpetration or attempted perpetration of any [listed felony], shall be deemed to be murder in the first degree, ... All other kinds of murder . . . shall be deemed murder in the second degree . . . ."

N.C. Gen. Stat. § 14-32(b): Felonious assault with a deadly weapon with intent to kill or inflicting serious injury; punishments

> "Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon."

N.C. Gen. Stat. § 20-140(b): Reckless driving

> "Any person who drives any vehicle upon a highway or public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property shall be guilty of reckless driving."

N.C. Gen. Stat. § 20-141(3)(b): Unlawful racing on streets and highways

> "It shall be unlawful for any person to operate a motor vehicle on a street or highway willfully in speed competition with another motor vehicle. Any person violating the provisions of this subsection shall be guilty of a Class 2 misdemeanor."

N.C. Gen. Stat. § 20-146: Drive on right side of highway; exceptions

> "(a) Upon all highways of sufficient width a vehicle shall be driven upon the right half of the highway . . . ."

STATEMENT OF THE CASE

A. Procedural History

Christopher Matthew Brown was tried and convicted of second degree murder, speed competition, reckless driving to endanger persons or property, driving to the left of center, and assault with a deadly weapon inflicting serious injury. The trial court arrested judgment on speed competition, reckless driving to endanger persons or property, and driving to the left of center, and imposed a sentence of 157 months to 198 months for second degree murder and 25 months to 39 months for assault with a deadly weapon inflicting serious injury. [3A-4A] The North Carolina Court of Appeals affirmed the convictions, rejecting petitioner's claim that the failure to instruct the jury on the defense of duress, as he requested, violated his constitutional rights to a fair trial and due process. [6A-10A] The Supreme Court of North Carolina denied petitioner's timely request to review this decision. [1A]

B. Factual Background

Christopher Matthew Brown (hereinafter Matt), a sixteen-year-old, high school junior, was going home where he lived with his parents after an all-county band clinic. He was driving his parents' straight-drive truck, which he had only driven twice before as he had gotten his drivers license only six months earlier. A car pulled out in front of him. Matt slammed his brakes to avoid a collision. His truck started to stall and Nathaniel Clark (hereinafter Nathaniel), the eighteen-year-old driver

of the vehicle behind him, flipped Matt "the bird." [6A]

Matt continued up the hill with Nathaniel right on his bumper. Matt was frightened. After both boys passed some slower cars and Matt moved back into the right lane, Nathaniel got more upset and threw up his hands. He was less than a foot off Matt's bumper.

When Matt passed the car in front of him, he looked up and saw Nathaniel cutting through both two turning lanes and getting right on his bumper again. Matt was now so scared that he started trying to get away from Nathaniel. Matt panicked; he felt as scared as he had ever been in his life. He estimated traveling about sixty-five to seventy miles an hour in his effort to avoid Nathaniel.

When Matt started to pull back into the lefthand lane to make a turn to go home, Nathaniel jerked around him into traffic, increased his speed, and struck an oncoming car. The entire episode, from the first encounter between Matt and Nathaniel until the collision, was no more than a minute or a minute and a half.

Nathaniel admitted he became agitated and angry at Matt, pulled out early, and crossed the double yellow line. He was mad at Matt. At the second passing zone, Matt pulled out and passed a car in front of them, with Nathaniel tailing closely behind him. Nathaniel then cut to his right and started to pass Matt. Matt, having passed the car in front of him, moved into the right lane. However, rather than simply slow down and follow behind

Matt, Nathaniel moved to the left and sped up beside Matt's truck. At this point, the passing zone ended and the wreck occurred. Nathaniel admitted he was speeding at sixty-five or seventy miles per hour. In his statement to the police, however, he said he was "T'ing" Matt's truck, a "pit maneuver" in which he was pushing Matt's truck down the road with his truck. The police found pieces of tail light in the front of Nathaniel's car.

A witness spoke with both Matt and Nathaniel after the wreck. Matt acted like he was "scared" and said Nathaniel had been dogging him and trying to run him off the road. Nathaniel called Matt a "son of a bitch" who pulled out in front of him. Nathaniel was chuckling when he made the statement.

Tom Brooks, an expert in collision reconstruction, observed the physical evidence, interviewed witnesses, and corroborated the consistency of the witnesses' testimony. Brooks also reviewed the statement of a witness who said Nathaniel's truck was one foot behind Matt's truck. From the physical evidence and marks on the trucks, Brooks concluded Matt's truck and Nathaniel's truck had multiple contacts before the fatal collision. He opined that Matt's intention was to keep Nathaniel from passing him. [5A]

Brooks also found pieces of tail lights imbedded in the front tires of Nathaniel's truck. He concluded Nathaniel drove his truck into the rear of Matt's truck. Given the multiple marks, Brooks felt Nathaniel had hit the rear of Matt's truck "again and again to make multiple marks."

MANNER IN WHICH THE FEDERAL CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner raised a due process challenge to the denial of his request for an instruction on the defense of duress to the charges of second degree murder, assault with a deadly weapon inflicting serious injury, willful speed competition, reckless driving to endanger, and driving left of center. His challenge was denied. He raised this federal constitutional claim in the North Carolina Court of Appeals, which rejected it on the merits. [6A-9A] He sought review of this issue in the Supreme Court of North Carolina. [1A] This claim has been fully litigated and decided on the merits below and is properly presented to this Court for review.

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT'S REFUSAL TO GIVE PETITIONER'S REQUESTED JURY INSTRUCTION ON DURESS AS A DEFENSE TO UNINTENTIONAL MURDER AND SEVERAL UNDERLYING OFFENSES, WHERE BY SUBSTANTIAL EVIDENCE SHOWED THAT HE FEARED FOR HIS SAFETY WHEN HE EXCEEDED THE SPEED LIMIT AND DROVE RECKLESSLY, VIOLATED HIS DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FOURTEENTH AMENDMENT.

This case presents an important constitutional issue in procedural and substantive respects. Procedurally, the issue involves the constitutional requirement that a defendant benefit from an

instruction on an affirmative defense. Substantively, the issue involves the availability of a duress defense to second degree murder, particularly where the charge is based on the violation of several motor vehicle laws (where alcohol was not involved) but no evidence even remotely suggests the defendant had an intent to kill anyone. The cases addressing this issue from other jurisdictions are contrary to the decision below. *See, e.g., State v. Riedl*, 15 Kan. App.2d 326, 807 P.2d 697 (1991) (applying duress defense to traffic offenses and leaving scene of accident); *State v. Messler*, 19 Conn. App. 432, 562 A.2d 1138 (1989) (duress defense applicable in speeding prosecution); *State v. Brown*, 306 Or. 399, 761 P.2d 1300 (1988) (duress defense applied in driving while license revoked case); *People v. Pena*, 149 Cal. App.3d Supp. 14, 197 Cal. Rptr. 264 (1983) (requiring duress defense for driving while impaired); *Browning v. State*, 31 Ala. App. 137, 13 So.2d 54 (1943) (requiring instruction on duress in reckless driving prosecution); *Brown v. State*, 227 Miss. 823, 87 So.2d 84 (1956) (requiring duress instruction where defendant drove recklessly and at excessive speed in fleeing law enforcement where no evidence police had warrant).

Moreover, the decision is contrary to *Taylor* and the teachings of numerous decisions of this Court. "[T]he trial court's refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." *Taylor*, 436 U.S. at 490; *see California v. Trombetta*, 467 U.S. 479, 485 (1984)("Under the Due Process Clause of the

Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness"); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(explaining defendant's constitutional right to due process means a fair opportunity to present and have the jury consider his defense). This Court should issue a writ of certiorari because the opinion below "is directly at odds with language in several of this Court's opinions," including *United States v. Bailey*, 444 U.S. 394, 409 (1980)(explaining contours of duress defense, citing Model Penal Code § 3.02(1)), as well as *Trombetta*, *Crane*, and *Taylor*, "and because it conflicts with the decisions of every other state court to have confronted this issue." *Crane*, 479 U.S. at 687 (explaining basis for issuing writ of certiorari).

Through both his own testimony as well as the observations of other people who saw portions of this unfortunate incident, petitioner presented evidence that he acted under duress. Nathaniel Clark frightened him by the way he acted and drove. Nathaniel tailgated him and made threatening gestures as he chased him along the highway. At least one witness who arrived immediately after the wreck described petitioner as "scared." Taken in a light most favorable to him, this evidence amply supported an instruction on duress.

But the court below held, without any analysis, that duress is not a defense to second degree murder. [7A] This holding reflects an antiquated view of the duress defense, especially where the killing is not done intentionally with a

deadly weapon, but results from an accident or negligent conduct.

Duress excuses "criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the law." *Bailey*, 444 U.S. at 409. *Bailey* referred approvingly to the Model Penal Code notion that the actor must believe that his commission of the crime is "necessary" to avoid a greater harm. *Id.* at 410 n.8 (citing Model Penal Code § 3.02(1)). "The compulsion may be by necessity, that is duress arising from circumstances, or by the application of duress on the defendant by another person." *Pena*, 149 Cal. App.3d Supp. at 22, 197 Cal. Rptr. at 269. Thus, if a reasonable person in petitioner's situation, where a person menacingly tailgated him in a way that amounted to a threat with a deadly weapon, would have feared death or serious bodily injury, his violation of the traffic laws would be under duress. *Browning*, 31 Ala. App. at 140, 13 So.2d at 56 (1943)(defendant entitled to duress instruction when fleeing unlawful threat or attack to save himself from feared injury; it is for jury to determine whether his flight (and excessive speed or reckless driving) was under duress and fear of death or grave physical harm).

Petitioner timely requested an instruction on duress on each of the charges, including second degree murder, assault with a deadly weapon inflicted serious injury, speed competition, reckless driving to endanger persons or property, and driving to the left of center. [7A, 30A] Petitioner also

specifically asked the trial court to instruct on duress with regard to the charges of assault with a deadly weapon inflicting serious injury, speed competition, reckless driving to endanger persons or property, and driving to the left of center. The trial court refused. Petitioner unsuccessfully challenged the constitutionality of this ruling on appeal. [7A-10A]

When a duress defense is supported by the evidence, as it was here, a defendant has a constitutionally protected right to an instruction on it. *Matthews v. United States*, 485 U.S. 58, 63 (1983); *see Stevenson v. United States*, 162 U.S. 313, 314-15 (1896); *see also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)(constitutional violation where lack of specific instruction impugns fairness of trial). A defense, such as duress, raised by the evidence is a substantial feature of the case, which requires an instruction from the trial court. The absence of a duress instruction "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Contrary to the ruling below, petitioner was entitled to an instruction that duress amounted to a defense on each of the underlying motor vehicle offenses, as *Riedl*, *Messler*, *Brown*, *Pena*, *Browning*, and *Brown* demonstrate.

The raison-d'etre for the rule requiring an instruction on a defense or a lesser included offense raised by the evidence is simple but profound. "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts

in favor of conviction." *Keeble v. United States*, 412 U.S. 205, 212 (1973); *see generally Beck v. Alabama*, 447 U.S. 625 (1980)(citing *Keeble* and explaining unconstitutionality of failing to provide jury with an option other than outright acquittal where evidence favorable to defendant supports lesser verdict); *accord Schad v. Arizona*, 501 U.S. 624 (1991). Duress excuses criminal conduct where the defendant was under an unlawful threat of imminent death or serious bodily injury, where the threat caused him to engage in conduct violating the literal terms of the law. *Bailey*, 444 U.S. at 409. "The compulsion may be by necessity, that is duress arising from circumstances, or by the application of duress on the defendant by another person." *Pena*, 149 Cal. App.3d Supp. at 22, 197 Cal. Rptr. at 269. Nathaniel's tailgating petitioner, in tandem with his threatening gestures and conduct, amounted to a threat with a deadly weapon that put petitioner in fear of death or serious bodily injury.

A defendant is entitled to an instruction on duress when he is fleeing an unlawful threat or attack to save himself from a feared injury. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995)(rejecting tendered jury instruction on a defense tantamount to preventing jury from passing on element of offense, which is unconstitutional). "No matter what may be the shape compulsion takes, if it affects the person, and be yielded to bona fide, it is a legitimate defense." *Browning*, 31 Ala. App. at 140, 13 So.2d at 56. The defendant was driving lawfully when he came to a police barricade, at which point "he accelerated his speed in order (so he claims) to escape from the blowing sirens and

unlawful shots being fired at him." *Id.* *Browning* explained "it was for the jury to determine whether his flight (and excessive speed or reckless driving) was under duress and fear of death or grave physical harm." *Id.* at 141, 13 So.2d at 57. Likewise, where a defendant received a panicked call from a female friend to "come and get me and the kids" and proceeded to drive to her house despite having a suspended license, he was entitled to have his theory of the case presented the jury with a proper instruction on the defense of duress. *Brown*, 306 Or. at 604-09, 761 P.2d at 1304-07. Whether the defendant's belief was reasonable "must be a question for the jury if there is evidence in the record from which the jury could so conclude." *Id.* at 607, 761 P.2d at 1304. As in *Browning* and *Brown*, and taking the evidence in a light most favorable to petitioner, he believed it was necessary to drive away from the pursuing and threatening silver truck. The reasonableness of his belief under the circumstances was a question for the jury. Contrary to the analysis of the court below, the jury should have been instructed on the legal principle of duress in order to make this determination.

Riedl addressed the issue in the context of driving while impaired. The defendant contended the trial court erred in denying him an instruction on the defense of compulsion on charges of driving while impaired and failing to stop at a stop sign. The evidence, taken in a light most favorable to the defendant, showed defendant and a friend had been drinking at a bar. As they left, three people verbally threatened them. When the defendant reached for his keys, one of the men hit him. The defendant

sped away, attracting the attention of police officers five miles from the bar. He claimed he felt compelled to drive away, even impaired, and violating several traffic laws, because he had two friends who had been killed in bar fights. 15 Kan. App.2d at 328, 807 P.2d at 699. Indeed, as the Kansas court noted, "[t]he case law from other jurisdictions overwhelmingly supports the conclusion that the compulsion defense, or similar defenses, should be deemed applicable to traffic offenses which do not require proof of criminal intent." *Id.* at 329, 807 P.2d at 700.

Here, however, petitioner never had a reasonably safe opportunity to avoid Nathaniel's pursuit and threatening conduct and remove himself from the situation. From the moment Nathaniel ran up on his bumper and "flipped him the bird," there was no chance to turn off the main road. Nathaniel was constantly tailgating him, usually only a foot or so behind. He admitted to the police that he was "T'ing" petitioner's truck, which is a "pit maneuver" where he pushing petitioner's truck down the road with his truck. The police found pieces of tail light in the front of Nathaniel's car. Even the prosecution's own accident reconstruction expert, upon seeing pictures of pieces of tail lights imbedded in the front tires of Nathaniel's truck, examining the accident scene, and talking to various witnesses, concluded Nathaniel drove his truck into the rear of petitioner's truck. Given the multiple marks, he believed Nathaniel hit the rear of petitioner's truck "again and again to make multiple marks." Both were driving very fast during the entire incident that lasted only about a minute and a half. Indeed,

petitioner thought Nathaniel himself had turned off the road on which they were traveling, at which point he felt relieved. But Nathaniel had only veered into another lane. In fact, he shot across two lanes to run up on petitioner's bumper again. Given these facts, which must be taken in a light most favorable to the defense, petitioner had no legitimate, reasonable opportunity to remove himself from Nathaniel's threatening and frightening pursuit. At the very least, whether he had a sufficient opportunity to remove himself from the threat would be a matter for the jury. Thus, an instruction on duress was proper even on the charge of second degree murder and certainly on the underlying traffic offenses.

With regard to second degree murder generally, the lower court, without any analysis, simply asserted that duress is never a defense to murder. [7A] This holding is at odds with the views of a significant number of other jurisdictions. *See, e.g.*, *People v. Anderson*, 28 Cal.4th 767, 794, 50 P.2d 368, 385 (2002)(noting five states adopting the Model Penal Code provision allowing duress as a defense to homicide); *Commonwealth v. Allen*, 711 N.E.2d 657, 660-61 (Mass. 1999)(noting disagreement among states as to availability of duress defense to murder, but assuming it is available under clearly defined circumstances such as the absence of a specific intent to kill). The lower court's view reflects an antiquated view of the duress defense, especially where the killing is not done intentionally with a deadly weapon. The Model Penal Code allows a defendant to rely on the defense of duress against any criminal charge, including homicide. Model

Penal Code, § 2.09 (Comment 3 to section 2.09 noting "even homicide may sometimes be the product of coercion that is truly irresistible"). At the very least, the common law view should apply only when the homicide involves an intentional act with a specific intent to kill. "[T]he weight of scholarly commentary favors the Model Penal Code's definition of duress and its abolition of the common law murder exception to the duress defense." *Anderson*, 28 Cal.4th at 794, 50 P.2d at 385 (citing numerous articles); *see* Larry Alexander, *A Unified Excuse of Preemptive Self Protection*, 74 Notre Dame L. Rev. 1475 (1999); Claire Oakes Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 Ariz. L. Rev. 251 (1995); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 So. Cal. L. Rev. 1331 (1989). Here, petitioner had no specific intent to harm anyone, and certainly had no intent to kill. He should have been able to rely on the defense of duress. The lower court's rejection of this defense to non-intentional homicide is contrary to the prevailing view among the jurisdictions, making it an issue worthy of resolution by this Court.

The lower court also erroneously held duress was inapplicable to assault with a deadly weapon inflicting serious injury, speed competition, reckless driving to endanger persons or property, and driving to the left of center. [7A-10A] But every other court considering this issue has concluded duress is a defense to each of these charges. *See Riedl*, 15 Kan. App.2d 326, 807 P.2d 697; *Messler*, 19 Conn. App. 432, 562 A.2d 1138; *Brown*, 306 Or. 399, 761 P.2d 1300; *Pena*, 149 Cal. App.3d Supp. 14, 197 Cal. Rptr.

264; *Browning*, 31 Ala. App. 137, 13 So.2d 54; *Brown*, 227 Miss. 823, 87 So.2d 84. Moreover, because speed competition, reckless driving to endanger persons or property, and driving to the left of center were each elements of second degree murder in this case, petitioner was entitled to instructions on duress with respect to them as elements of second degree murder.

Petitioner never had a reasonable chance to avoid Nathaniel's threatening conduct and avoid the incident. There was no legitimate chance to turn off the road as Nathaniel constantly kept within a foot of his bumper with both cars going nearly seventy miles an hour in an incident that lasted only about a minute. At the very least, whether he had a sufficient opportunity to remove himself from the threat would be a matter for the jury. "It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably." *Taylor*, 436 U.S. at 489. But the court failed in its responsibility.

There now exists a serious conflict in the law regarding the availability of a duress defense for a situation where a defendant causes someone's death without an intent to kill and for non-homicide offenses. Indeed, the overwhelming majority of states have decided this constitutional issue contrary to the ruling of the lower court. This Court should issue a writ of certiorari to resolve the conflict among the states on this important constitutional question.

CONCLUSION

For the reasons stated herein, Christopher Matthew Brown respectfully requests that this Court grant a writ of certiorari to review the decision below and resolve the dispute among the jurisdictions on the important constitutional question regarding the right to a jury instruction on a defense.

Respectfully submitted,

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